IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34332

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 640**
	)	
Plaintiff-Respondent,	)	**Filed: September 12, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
JOSHUA PAUL LARKEY aka LARKY,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Judgment of conviction for trafficking in a controlled substance and for unlawful possession of a firearm, affirmed.

Robert S. Lewis, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Chief Judge

Joshua Paul Larkey appeals from his judgment of conviction for trafficking in cocaine and unlawful possession of a firearm. Specifically, he appeals the denial of his motion to suppress evidence. We affirm.

I.
BACKGROUND

On the morning of December 10, 2006, Boise City Detective Clay Christensen received information from an informant that a maroon minivan would be traveling from Las Vegas to Boise that day with a large quantity of cocaine. The informant stated that there would be two males in the minivan, and the cocaine, up to two kilos worth, would be hidden inside a sealed box of Tide detergent, set among other cleaning items in the van. Josh and Cash were the names of the two men who would be traveling in the van. A few hours later, the informant contacted Detective Christensen again. He was told that the minivan left Boise from the area of Eagle and

Ustick roads, and a Honda Accord belonging to Josh was parked nearby. The minivan was reportedly registered to a Hispanic female who lived near Capital High School. Josh was said to be carrying a gun and had made statements that he would not be captured by police and that "he would shoot it out with the cops if he had to." The informant called Detective Christensen a third time that afternoon. Detective Christensen went to the Eagle and Ustick area and located a Honda Accord matching the description he was given; the car was registered to Joshua Paul Larkey. A criminal history check revealed that Larkey had two previous narcotics-related convictions, and Larkey did not live in the area where the car was parked. Detective Christensen also received information about the vehicle and the last name of Cash, and was able to discover Cash Hammerland's home address from that information. Hammerland's vehicle was parked at his home.

That evening, another police officer observed a maroon minivan with two male occupants heading toward Boise. A license plate check showed that it was registered to a female with a Hispanic surname who lived near Capital High School. Detective Christensen also located the minivan, and followed it in his unmarked patrol car. The driver of the minivan committed several traffic infractions within one mile from Hammerland's home. Detective Christensen initiated a stop of the minivan, accompanied by two other officers in separate unmarked vehicles. All three officers drew their weapons, but did not point them at the minivan. The driver, Larkey, was ordered out of the vehicle, instructed to walk backwards to the officers' position, ordered to kneel on the ground, and then handcuffed. He was frisked for weapons and placed in the backseat of a patrol car that arrived shortly after the stop. The passenger, Hammerland, was similarly removed from the minivan, handcuffed, and placed in the backseat of a separate patrol car. All together, at least five officers in marked and unmarked cars were present for the stop.

Detective Coy Bruner, also on the scene of the stop, approached the minivan to verify if any other passengers were hiding in the vehicle. Through the side window he saw a handgun and a bag of what appeared to be marijuana lying on the floor behind the driver's seat. Detective Bruner communicated this information to Detective Christensen, who ran his drug-detection dog, Pepsi, around the exterior of the minivan. As Pepsi approached the driver's side door, she began sniffing energetically, and launched herself through the open window. Detective Christensen immediately brought her back out of the minivan through the window, and continued around the perimeter of the car. When Pepsi reached the open passenger's side door, she again increased

her sniffing and alerted on the floor in front of the passenger's seat. One kilogram of cocaine was found underneath the front passenger seat.

Larkey and Hammerland were arrested and charged with trafficking in cocaine, Idaho Code § 37-2732B(a)(2), and Larkey was also charged with unlawful possession of a firearm, I.C. § 18-3316. Prior to trial, Larkey moved to suppress the evidence found inside the minivan. He alleged that he was arrested without probable cause, and therefore all of the evidence was inadmissible against him as fruit of the poisonous tree. The district court denied the motion, and a jury found him guilty on both counts. Larkey was sentenced to a unified term of sixteen years, with ten years determinate, for trafficking, and to a unified term of five years, with one year determinate for unlawful possession of a firearm. He was also ordered to pay a fine of $25,000 and laboratory costs. This appeal followed.

II.
STANDARD OF REVIEW

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

III.
DISCUSSION

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures of persons or property. Searches or detentions conducted without a warrant are presumptively unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Stewart*, 145 Idaho 641, 644, 181 P.3d 1249, 1252 (Ct. App. 2008). The state may overcome this presumption by demonstrating that the search or seizure fell within a well-recognized exception to the warrant requirement or was otherwise reasonable under the circumstances. *Stewart*, 145 Idaho at 644, 181 P.3d at 1252; *State v. Martinez*, 129 Idaho 426, 431, 925 P.2d 1125, 1130 (Ct. App. 1996). A seizure that implicates the Fourth Amendment occurs when an officer, by means

of physical force or show of authority, restrains a citizen's liberty. *State v. Ferreira,* 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999); *State v. Fry*, 122 Idaho 100, 102, 831 P.2d 942, 944 (Ct. App. 1991). A seizure may take the form of either an arrest or an investigative detention. An arrest is a full-scale seizure of the person which in some circumstances is permitted without a warrant if the officer has probable cause to believe that the individual has committed a crime. *Ferreira*, 133 Idaho at 479, 988 P.2d at 705; *State v. Zapp,* 108 Idaho 723, 726-27, 701 P.2d 671, 674-75 (Ct. App. 1985). An investigative detention is a seizure of limited duration to investigate suspected criminal activity and does not offend the Fourth Amendment if the facts available to the officer at the time gave rise to reasonable suspicion to believe that criminal activity was afoot. *Terry v. Ohio*, 392 U.S. 1 (1968); *Stewart*, 145 Idaho at 644, 181 P.3d at 1252; *Ferreira,* 133 Idaho at 479, 988 P.2d at 705; *State v. Dice,* 126 Idaho 595, 599, 887 P.2d 1102, 1106 (Ct. App. 1994); *State v. Knapp,* 120 Idaho 343, 347, 815 P.2d 1083, 1087 (Ct. App. 1991).

A traffic stop constitutes a seizure of the motorist and is therefore subject to Fourth Amendment strictures, but because it is limited in scope and duration, it is analogous to an investigative detention and is analyzed under the principles set forth in *Terry*. *Delaware v. Prouse,* 440 U.S. 648, 653 (1979). An investigative detention based on reasonable suspicion must be conducted in a manner that is reasonably related in scope to the circumstances which justified the interference in the first place. *Terry,* 392 U.S. at 20-21; *Florida v. Royer,* 460 U.S. 491 (1983); *Stewart*, 145 Idaho at 644-45, 181 P.3d at 1252-53.

Larkey asserts that he was arrested without a warrant and without probable cause when he was ordered to exit the minivan at gunpoint, handcuffed, and placed in the backseat of a patrol car without officers explaining the purpose of the stop. Larkey insists that no reasonable person would have felt free to leave, and therefore he was under arrest. The state counters that the display of force and use of handcuffs were warranted under the totality of the circumstances and did not result in an unlawful arrest.[1] This Court recently analyzed the difference between a *de*

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[1] The state first argues that Larkey has failed to provide an adequate record on appeal. The district court considered the transcript from the preliminary hearing when ruling on Larkey's motion to suppress, but that transcript is not part of the record on appeal. However, portions of a transcript missing on appeal are presumed to support the actions of the district court. *State v. Repici*, 122 Idaho 538, 541, 835 P.2d 1349, 1352 (Ct. App. 1992). Due to our determination that

facto arrest and an investigatory detention as they relate to the Fourth Amendment. *Stewart*, 145 Idaho 641, 181 P.3d 1249. We concluded that no rigid classification defines the boundary between permissible and impermissible detentions. *Id.* at 645, 181 P.3d at 1253. There is no bright line demarcating an unreasonably intrusive investigative detention from a reasonable one. *Id.* Instead, "common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685 (1985); *Stewart*, 145 Idaho at 645, 181 P.3d at 1253; *see also State v. Pannell*, 127 Idaho 420, 423, 901 P.2d 1321, 1324 (1995).

> It is true that both the United States Supreme Court and this Court have used the term "de facto arrest" to describe seizures of individuals that exceeded the bounds of an investigative detention. *Sharpe*, 470 U.S. 675; *Ferreira*, 133 Idaho at 480, 988 P.2d at 706; *Martinez*, 129 Idaho 426, 925 P.2d 1125. It does not follow, however, that any restraint short of placing the suspect in custody constitutes a permissible investigative detention, nor that restraint equivalent to a formal arrest will in every case be impermissible for a detention that is justified only by reasonable suspicion. In some circumstances, officer conduct that does not include all the earmarks of an arrest may be unreasonable in comparison to the justification for the investigative detention; and conversely, the imposition of restraints on the individual's freedom that rise to the equivalent of arrest may be reasonable during an investigative detention where such action is justified by the surrounding circumstances, including the need to safeguard officers from injury.

Stewart, 145 Idaho at 645, 181 P.3d at 1253. United States Supreme Court decisions indicate that police conduct which is less intrusive than a *de facto* arrest may nevertheless be unreasonable for an investigative detention. *Id.* at 645-46, 181 P.3d at 1253-54. Indeed, *Terry* itself states that a detention based only on reasonable suspicion must be conducted in a manner that is "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. Later, in *Royer*, the Supreme Court suggested that both the length of the stop and the investigative methods employed by the police were significant when it noted that a detention must "last no longer than is necessary to effectuate the purpose of the stop," and that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. Partially in reliance on *Royer*, we have held that the "intensity" of the detention--that is, the reasonableness and intrusiveness of the investigative methods employed by

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the district court did not err in denying Larkey's motion to suppress based on the record provided, we need not consider this issue further.

the police--is a significant factor in determining whether a detention has become unreasonable. *Stewart*, 145 Idaho at 646, 181 P.3d at 1254; *State v. Parkinson*, 135 Idaho 357, 361, 17 P.3d 301, 305 (Ct. App. 2000).

Larkey focuses on four factors for his conclusion that the investigative detention was unreasonable:[2] the number of officers and police cars present at the stop, that the officers had their guns drawn, that he was handcuffed, and that he was placed in the backseat of a police car while still handcuffed. No single factor, by itself, makes Larkey's detention unreasonable. *See, e.g.*, *United States v. Sanders*, 994 F.2d 200, 206 (5th Cir. 1993) ("Clearly, using some force on a suspect, pointing a weapon at a suspect, ordering a suspect to lie on the ground, and handcuffing a suspect--whether singly or in combination--do not automatically convert an investigatory detention into an arrest requiring probable cause."); *United States v. Baron*, 860 F.2d 911, 915 (9th Cir. 1988) ("[A] *Terry*-stop is not transformed into a de facto arrest when a defendant is moved from the street to the back of a police car."); *Stewart*, 145 Idaho at 647, 181 P.3d at 1255 (referencing the utter lack of cases declaring that the presence of multiple officers renders an investigative detention unreasonable). Rather, this Court must consider all of the surrounding circumstances and determine whether the investigative methods employed were the least intrusive means reasonably available to verify or dispel the officers' suspicion in a short period of time. *State v. Frank*, 133 Idaho 364, 368, 986 P.2d 1030, 1034 (Ct. App. 1999). The intensity permissible in a given stop turns on the specific facts of the situation and the reasonable inferences officers may draw from those facts. *Parkinson*, 135 Idaho at 362, 17 P.3d at 306. In determining if the detention becomes unreasonable, the court is to consider: (1) the duration of the invasion imposed by the additional restriction; and (2) the law enforcement purposes served. *State v. DuValt*, 131 Idaho 550, 554, 961 P.2d 641, 645 (1998). Much as a "bright line" rule would be desirable in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria. *Pannell*, 127 Idaho at 423, 901 P.2d at 1324; *see also Sharpe*, 470 U.S. at 685.

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[2] Larkey frames his argument in terms of *de facto* arrest, and how these factors contributed to his determination that he was not free to leave. However, due to the analytical framework set forth in *Stewart*, these factors will be considered for their impact on the reasonableness and intrusiveness of the investigative detention.

Although Idaho courts have not addressed these exact circumstances, several cases are instructive on the elements raised by Larkey. First, in *State v. Salato*, 137 Idaho 260, 47 P.3d 763, (Ct. App. 2001), this Court considered whether an informant's report could give rise to reasonable suspicion for an investigatory stop. We concluded that the articulable facts supporting reasonable suspicion, while usually grounded in an officer's personal perceptions and inferences, may in appropriate circumstances be based upon external information, such as an informant's tip conveyed through police dispatch. *Id.* at 265, 47 P.3d at 768. The officer in that case received a report of an armed robbery at the M & W Market on Warmsprings Avenue in Boise. A citizen reported seeing a suspicious vehicle "casing" the market just prior to the robbery. This citizen described the car and the occupants for officers. Her description was quite similar to the description of a man who robbed a nearby Jackson's store shortly after the M & W robbery. The officer located the vehicle with a person matching the description one block away from the Jackson's store. He initiated a stop of the vehicle, and used handcuffs to detain the occupants. The officer had reasonable suspicion to stop the car to investigate whether or not the occupants had been involved in the two armed robberies; his use of handcuffs for officer safety was likewise reasonable because the suspects were reportedly armed. *Id.* at 266, 47 P.3d at 769.

Similarly, in *Frank*, 133 Idaho 364, 986 P.2d 1030, an officer was dispatched to a storage unit at night with a report of three men "acting suspiciously." The officer encountered one man, who was reluctant to stop what he was doing and speak with the officer. After conducting a brief frisk for weapons, the man was handcuffed and placed in the back of the officer's patrol car while he finished inspecting the area. This Court determined that the officer did not exceed the bounds of a *Terry* stop because the officer used reasonable means to insure his own safety and to quickly conclude his investigation. *Id.* at 368-69, 986 P.2d at 1034-35. On the other hand, in *Pannell*, 127 Idaho at 424-25, 901 P2d at 1325-26, the Idaho Supreme Court found the use of handcuffs exceeded what was reasonably necessary for a *Terry* investigation. The Court held that the risk to officer safety was not high enough to justify their use. *Id.* In that case, three officers responded to a complaint of domestic violence. Pannell had driven away from the house, may have been intoxicated, and there were weapons in the home. Officers stopped Pannell, but did not investigate whether he was under the influence; instead they frisked him, placed him in handcuffs, and transported him back to the house in a patrol car. Pannell was fully

compliant with officers during their investigation. Under the totality of the circumstances, the level of restraint used on Pannell was higher than reasonably necessary. *Id.*

The Fifth Circuit reviewed the holdings of other circuits to decide whether an officer's drawing a gun, ordering a suspect to lie down on the ground, and then using handcuffs violated the boundaries of a *Terry* stop. *Sanders*, 994 F.2d at 202. The officer had been dispatched to a report of an individual brandishing a gun in a neighborhood grocery store. The officer was given a detailed description of the suspect. When the officer arrived at the store, a group of people were standing out front, including a man matching the suspect's description. When the officer stopped his patrol car, the man walked away from the group. Since the suspect was reportedly armed, the officer stood behind his open car door, drew his weapon, and ordered the man to stop. Although he did not lie down on the ground as ordered, the man did stop moving and was compliant while a second officer placed him in handcuffs. *Id.* The Fifth Circuit found that other circuits have allowed an officer to draw a gun without exceeding the bounds of a permissible *Terry* stop, have permitted a suspect to be detained in a patrol car during the course of a *Terry* investigation, and have upheld the use of handcuffs during a reasonable *Terry* stop. *Id.* at 205. The court therefore concluded that the officer's actions in *Sanders* were within the bounds of a reasonable *Terry* investigation based on the totality of the circumstances. *Id.* at 207-08.

Conversely, the Tenth Circuit found officers' display of weapons after stopping a vehicle, handcuffing the suspects, and placing them in separate vehicles was unreasonable under the circumstances in that case. *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052-53 (10th Cir. 1994). Officers had received information from an informant that drugs would be delivered to California from a specific location in New Mexico. Officers set up surveillance of the driver's home and vehicle, and eventually conducted a felony stop on the interstate. Even though the court acknowledged that "[d]rugs and guns and violence often go together, and thus this might be a factor tending to support an officer's claim of reasonableness," it concluded that there was no evidence in this case that the suspects might be violent. *Id*. Therefore, the use of weapons and handcuffs exceeded what was necessary for a *Terry* stop and investigation. *Id.* at 1053.

In this case, Detective Christensen was informed that Josh and Cash would be bringing a large quantity of cocaine to Boise from Las Vegas in a maroon minivan. Josh was reported to carry a gun and would rather have a shoot-out with police than be captured by them. Detective Christensen was correctly informed of the location and style of Joshua Larkey's vehicle, as well

as the home address and location of Cash Hammerland's car. Two men were spotted in a maroon minivan driving into Boise which was registered to a woman with a Hispanic surname who lived in the area of Capital High School, as the informant had stated. The minivan was en route to Hammerland's home address when it was stopped. Although some of the information provided by the informant could have been observed by a bystander on the street, the combination of details suggested someone with inside information. *See Alabama v. White*, 496 U.S. 325 (1990). Detective Christensen had reasonable suspicion to stop the minivan to conduct a *Terry* investigation into drug trafficking. When an informant is shown to be right about some things, "he is probably right about other facts that he has alleged." *Id.* at 331. Therefore it was also reasonable for Detective Christensen and the other officers present at the time of the stop to draw their weapons, handcuff both Larkey and Hammerland, and place them in separate vehicles. Larkey posed a threat to officer safety. Although Larkey was frisked while handcuffed prior to being seated in the back of a patrol car, and no weapons were found on him, his threats of "shooting it out with the cops" presented an ongoing risk of violence, especially if others were hiding in the minivan.

Due to the heightened threat of violence on this drug-related felony encounter, and the quantity of accurate information received from the informant, the officers did not exceed the scope of a reasonable *Terry* investigation by drawing their weapons, handcuffing Larkey, and placing him in the backseat of a patrol car.

IV.

CONCLUSION

The district court did not err by denying Larkey's motion to suppress evidence. Detective Christensen and the other officers acted within the bounds of a reasonable *Terry* stop when they drew their weapons, handcuffed Larkey and his passenger, and placed both men in separate patrol cars while conducting their investigation. Accordingly, Larkey's judgment of conviction is affirmed.

Judge LANSING and Judge PERRY **CONCUR**.